

AMENDED IN ASSEMBLY MAY 1, 2003
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CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL

No. 567

Introduced by Assembly Member Simitian

February 18, 2003

An act to amend Sections 17538.4 and 17538.45 of the Business and Professions Code, relating to advertising.

LEGISLATIVE COUNSEL'S DIGEST

AB 567, as amended, Simitian. Unsolicited electronic mail advertisements.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit unless that person or entity establishes a toll-free telephone number or valid sender operated return e-mail address that a recipient may contact to notify the sender not to e-mail the recipient any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive any further unsolicited documents. Existing law requires certain unsolicited e-mail advertisements to contain a heading of "ADV:" or "ADV:ADLT."

This bill would authorize the recipient of an advertisement that violates these provisions to bring an action against the initiator of the unsolicited commercial e-mail for the recovery of actual damages or \$1,000, whichever is greater, for each violation.

Existing law prohibits a registered user of an electronic mail service provider from using, or causing to be used, the provider's equipment located in this state in violation of the provider's policy prohibiting or restricting its use for the initiation of unsolicited electronic mail advertisements. Existing law also prohibits an individual, corporation, or other entity from using or causing to be used a provider's equipment located in this state in violation of the provider's policy prohibiting or restricting its use to deliver unsolicited electronic mail advertisements to its registered users. Existing law authorizes a provider whose policy is violated to bring a civil action to recover damages of \$50 for each message initiated or delivered in violation of these provisions, up to a maximum of \$25,000.

This bill would instead authorize *an electronic mail service* provider to bring a civil action to recover damages of \$100 for each message initiated or delivered in violation of these provisions, up to a maximum of \$50,000. *The bill would also revise the definition of electronic mail service provider.*

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 17538.4 of the Business and Professions
- 2 Code is amended to read:
- 3 17538.4. (a) A person or entity conducting business in this
- 4 state shall not electronically mail (e-mail) or cause to be e-mailed
- 5 documents containing unsolicited advertising material for the
- 6 lease, sale, rental, gift offer, or other disposition of any realty,
- 7 goods, services, or extension of credit unless that person or entity
- 8 establishes a toll-free telephone number or valid sender operated
- 9 return e-mail address that the recipient of the unsolicited
- 10 documents may call or e-mail to notify the sender not to e-mail any
- 11 further unsolicited documents.
- 12 (b) An unsolicited e-mailed document subject to this section
- 13 shall include a statement informing the recipient of the toll-free
- 14 telephone number that the recipient may call, or a valid return



1 address to which the recipient may write or e-mail, as the case may
2 be, notifying the sender not to e-mail the recipient any further
3 unsolicited documents to the e-mail address, or addresses,
4 specified by the recipient.

5 The statement shall be the first text in the body of the message
6 and shall be of the same size as the majority of the text of the
7 message.

8 (c) Upon notification by a recipient of his or her request not to
9 receive any further unsolicited e-mailed documents, a person or
10 entity conducting business in this state shall not e-mail or cause to
11 be e-mailed any unsolicited documents to that recipient.

12 (d) This section shall apply when the unsolicited e-mailed
13 documents are delivered to a California resident via an electronic
14 mail service provider's service or equipment located in this state.
15 For these purposes "electronic mail service provider" means a
16 business or organization qualified to do business in this state that
17 provides individuals, corporations, or other entities the ability to
18 send or receive electronic mail through equipment located in this
19 state and that is an intermediary in sending or receiving electronic
20 mail.

21 (e) As used in this section, "unsolicited e-mailed documents"
22 means an e-mailed document or documents consisting of
23 advertising material for the lease, sale, rental, gift offer, or other
24 disposition of any realty, goods, services, or extension of credit
25 that meet both of the following requirements:

26 (1) The documents are addressed to a recipient with whom the
27 initiator does not have an existing business or personal
28 relationship.

29 (2) The documents are not sent at the request of, or with the
30 express consent of, the recipient.

31 (f) As used in this section, "e-mail" or "cause to be e-mailed"
32 does not include or refer to the transmission of any documents by
33 a telecommunications utility or Internet service provider to the
34 extent that the telecommunications utility or Internet service
35 provider merely carries that transmission over its network.

36 (g) In the case of e-mail that consists of unsolicited advertising
37 material for the lease, sale, rental, gift offer, or other disposition
38 of any realty, goods, services, or extension of credit, the subject
39 line of each and every message shall include "ADV:" as the first
40 four characters. If these messages contain information that

1 consists of unsolicited advertising material for the lease, sale,
2 rental, gift offer, or other disposition of any realty, goods, services,
3 or extension of credit that may only be viewed, purchased, rented,
4 leased, or held in possession by an individual 18 years of age and
5 older, the subject line of each and every message shall include
6 “ADV:ADLT” as the first eight characters.

7 (h) An employer who is the registered owner of more than one
8 e-mail address may notify the person or entity conducting business
9 in this state e-mailing or causing to be e-mailed documents
10 consisting of unsolicited advertising material for the lease, sale,
11 rental, gift offer, or other disposition of any realty, goods, services,
12 or extension of credit of the desire to cease e-mailing on behalf of
13 all of the employees who may use employer-provided and
14 employer-controlled e-mail addresses.

15 (i) The recipient of an advertisement transmitted in violation of
16 this section may bring an action against the initiator of the
17 unsolicited commercial e-mail sent in violation of this section for
18 the recovery of actual damages or one thousand dollars (\$1,000),
19 whichever is greater, for each violation.

20 (j) This section, or any part of this section, shall become
21 inoperative on and after the date that federal law is enacted that
22 prohibits or otherwise regulates the transmission of unsolicited
23 advertising by electronic mail (e-mail).

24 (k) As used in this section, the following terms have the
25 following meanings:

26 (1) “Initiator of the unsolicited commercial e-mail” means a
27 person or entity that transmits or causes to be transmitted a
28 commercial e-mail advertisement, but does not include a
29 telecommunications utility or an electronic mail service provider
30 that transmits the advertisement through its network or system.

31 (2) “Electronic mail service provider” means a person or
32 entity, including an Internet service provider, that is an
33 intermediary in sending or receiving electronic mail or that
34 provides to users of the electronic mail service the ability to send
35 or receive electronic mail. An electronic mail service provider may
36 also provide technology to initiators, including providing the
37 initiator of the unsolicited commercial e-mail with the
38 technological means to sort, store, or otherwise manage recipient
39 lists and generate reports based on that initiator’s activity.



SEC. 2. Section 17538.45 of the Business and Professions Code is amended to read:

17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) “Electronic mail advertisement” means an electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) “Unsolicited electronic mail advertisement” means an electronic mail advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

~~(3) “Electronic mail service provider” means a business or organization qualified to do business in California that provides registered users with the ability to send or receive electronic mail through equipment located in this state, and that is an intermediary in sending or receiving electronic mail.~~

(3) “Electronic mail service provider” means a person or entity, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to users of the electronic mail service the ability to send or receive electronic mail. An electronic mail service provider may also provide technology to initiators, including providing the initiator of the unsolicited commercial e-mail with the technological means to sort, store, or otherwise manage recipient lists and generate reports based on that initiator’s activity.

(4) “Initiation” of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of an intervening electronic mail service provider that may handle or retransmit the electronic message.

(5) “Registered user” means an individual, corporation, or other entity that maintains an electronic mail address with an electronic mail service provider.

(b) No registered user of an electronic mail service provider shall use or cause to be used the provider’s equipment located in this state in violation of the provider’s policy prohibiting or

1 restricting the use of its service or equipment for the initiation of
2 unsolicited electronic mail advertisements.

3 (c) No individual, corporation, or other entity shall use or cause
4 to be used, by initiating an unsolicited electronic mail
5 advertisement, an electronic mail service provider's equipment
6 located in this state in violation of the provider's policy prohibiting
7 or restricting the use of its equipment to deliver unsolicited
8 electronic mail advertisements to its registered users.

9 (d) An electronic mail service provider shall not be required to
10 create a policy prohibiting or restricting the use of its equipment
11 for the initiation or delivery of unsolicited electronic mail
12 advertisements.

13 (e) Nothing in this section shall be construed to limit or restrict
14 the rights of an electronic mail service provider under Section
15 230(c)(1) of Title 47 of the United States Code, or any decision of
16 an electronic mail service provider to permit or to restrict access
17 to or use of its system, or any exercise of its editorial function.

18 (f) (1) In addition to any other action available under law, an
19 electronic mail service provider whose policy on unsolicited
20 electronic mail advertisements is violated as provided in this
21 section may bring a civil action to recover the actual monetary loss
22 suffered by the provider by reason of that violation, or liquidated
23 damages of one hundred dollars (\$100) for each electronic mail
24 message initiated or delivered in violation of this section, up to a
25 maximum of fifty thousand dollars (\$50,000) per day, whichever
26 amount is greater.

27 (2) In an action brought pursuant to paragraph (1), the court
28 may award reasonable attorney's fees to the prevailing party.

29 (3) (A) In an action brought pursuant to paragraph (1), the
30 electronic mail service provider shall establish as an element of its
31 cause of action that prior to the alleged violation, the defendant had
32 actual notice of both of the following:

33 (i) The electronic mail service provider's policy on unsolicited
34 electronic mail advertising.

35 (ii) That the defendant's unsolicited electronic mail
36 advertisements would use or cause to be used the electronic mail
37 service provider's equipment located in this state.

38 (B) In this regard, the Legislature finds that with rapid
39 advances in Internet technology, and electronic mail technology in
40 particular, Internet service providers are already experimenting

1 with embedding policy statements directly into the software
2 running on the computers used to provide electronic mail services
3 in a manner that displays the policy statements every time an
4 electronic mail delivery is requested. While the state of the
5 technology does not support such a finding at present, the
6 Legislature believes that, in a given case at some future date, a
7 showing that notice was supplied via electronic means between the
8 sending and receiving computers could be held to constitute actual
9 notice to the sender for purposes of this paragraph.
10 (4) A violation of this section shall not be subject to Section
11 17534.

